86-1228

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

CELSO MORALES,

Petitioner

versus

MACK TRUCKS, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE THE COURT FOUND THAT PLAINTIFF FAILED TO MEET HIS BURDEN OF SHOWING THAT DEFENDANT"S FAILURE TO RECALL HIM WAS PRETEXTUAL DESPITE PLAINTIFF'S ALLEGATION OF FACTS WHICH CREATE GENUINE ISSUES OF MATERIAL FACT CONCERNING DEFENDANT"S TRUE MOTIVES FOR BYPASSING PLAINTIFF?

II. WHETHER OR NOT THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT WHERE PLAINTIFF ALLEGED FACTS CREATING A GENUINE ISSUE OF MATERIAL FACT?

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IN THE
SUPREME COURT OF THE UNITED STATES

_____

NO.

_____

CELSO MORALES,

Petitioner

versus

MACK TRUCKS, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Celso Morales prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit.

OPINIONS BELOW

The judgment and Order of the United States Court of Appeals, Third Circuit, rendered November 26, 1986 is unrecorded and appears at page 30 of the Appendix herein. Judgment and Order of the United States District Court Eastern District of Pennsylvania rendered April 8, 1986 is un-

reported and appears at page 32 of the Appendix herein.

JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit, dated November 26, 1986 and the Writ of Certiorari is timely filed within ninety days thereof. The jurisdiction of this Court rests upon 28 U.s.C. Section 254(1) and Rule 17 of the Court.

FEDERAL PROVISIONS INVOLVED

"It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color religion sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment op-

> portunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> Civil Rights Act of 1964, effective July 2, 1964. 42 U.S.C. Section 2000e-2(a).

STATEMENT OF THE CASE

a. Procedural History of Case

Plaintiff, Petitioner herein, filed a charge of employment discrimination against Defendant, Respondent herein, Mack Trucks, Inc. with the EEOC on or about February 4, 1984 charging that the Defendant failed to recall him to employment with Mack Trucks solely because of his national origin. On August 13, 1984, at Plaintiff's request, the EEOC issued a right to sue letter to Plaintiff.

On September 18, 1984, Plaintiff filed suit before the United States District Court for the Eastern District of Pennsylvania. The United States District Court's jurisdiction was founded upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e 2(a) and Section 2000e-5f and 28 U.S.C.

Section 1332, Diversity of Citizenship in that Plaintiff is a citizen of Ecuador, the Defendant is a citizen of Pennsylvania, and the matter in controversy, exclusive of interest and costs, exceeds Ten Thousand ($10,000.00) Dollars.

The case was assigned to the Honorable E. Mac Troutman. On January 31, 1986, the Defendant filed a Motion For Summary Judgment. On February 21, 1986, Plaintiff filed his Brief, with Affidavit, and attachments in opposition to Defendant's Motion For Summary Judgment. On March 17, 1986, Defendant filed its Reply, with Affidavit, in support of its original motion.

On April 15, 1986, the Court filed an Order and Memorandum Opinion dated April 8, 1986 granting Defendant's Motion For Summary Judgment. Plaintiff filed a timely appeal to the United States Court of Appeals, Third Circuit on May 2, 1986. On November 26, 1986, the Court of Appeals entered a Judgment Order affirming the

District Court's order granting Defendant's Motion For Summary Judgment. Plaintiff files this timely Petition For Writ of Certiorari which is now before this Court for disposition.

b. STATEMENT OF THE FACTS

Plaintiff is an Hispanic male and was born in Ecuador on July 28, 1954. At all relevant times, he was married and the sole support of his wife and two minor children. (Para. 3, Morales Affidavit).

Plaintiff was employed by Mack Trucks from May 2, 1978 until November, 1979. (Para. 4, Morales Affidavit). In the entire course of his employment with Mack, Plaintiff was never disciplined by Mack for excessive absenteeism or for any other reason. (Para. 5, Morales Affidavit). If he had a serious absentee or tardiness problem as claimed by Mack Trucks, Inc., Plaintiff would have been subject to disciplinary action by his superiors. (Para. 6, Morales Affidavit). The absence of any disciplinary action against

him for absenteeism or tardiness is evidence that the present claim of any absentee or tardiness problem is a complete fabrication designed to discriminate against Plaintiff because of his national origin. (Para. 7, Morales Affidavit).

On January 8, 1979, while working at Mack's Macungie Plant, Plaintiff sustained a serious work-related injury to his back. (Exhibit B to Morales Affidavit). From the time he sustained the work-related injury until April 30, 1979, Plaintiff received approximately 6 weeks of workmen's compensation benefits based upon his work-related injury. The exact dates for which workmen's compensation benefits were paid were attached at Exhibit A to Morales Affidavit.

In actual fact, Plaintiff should have been placed on workmen's compensation for the entire period from January 8, 1979 through April 30, 1979, but because Mack Truck, Inc. is self-insured for workmen's compensation purposes, it intentionally delays putting

employees on workmen's compensation, and attempts to use a program of "dispensary time" and light duty work to reduce time spent on workmen's compensation. (Para. 10, Morales Affidavit). During the period immediately after his injury, Plaintiff was placed on light duty work for almost every day which he did work until he was released for work from workmen's compensation. A copy of his work releases were attached as Exhibit C to Morales Affidavit. Other days Plaintiff was permitted to leave early, or arrive late, in order to be examined by physicians selected by Mack Trucks, Inc. or to undergo physical therapy as directed by physicians selected by Mack Trucks. (Para. 11, Morales Affidavit).

During the period after his injury and before his release from workmen's compensation in April, 1979, Plaintiff reported to work in a timely manner every day, and was never late or absent unless specifically authorized by a superior. (Para. 12, Morales Affidavit). Several of the days in which he reported to

work during the aforesaid period surrounding his injury, Plaintiff reported directly to Mack's dispensary as directed by his supervisor. On such days, he did not clock in until being directed to do so by dispensary staff, which was the customary practice. The usage of this procedure resulted in his time card indicating tardiness even though he reported directly to the dispensary as required in a timely fashion. (Para. 13, Morales Affidavit).

During the entire course of his employment with Mack in 1978, Plaintiff was late to work one time and was absent one time. (Exhibit A, pg. 1, Exhibit E to Morales Affidavit).

During the entire course of his employment with Mack in 1979, Plaintiff was late to work one time and was absent one time. (Exhibits A,B,C,D,E to Morales Affidavit).

Plaintiff was laid off from Mack for a final time in November 1979. (Para. 16 Morales Affidavit). On or about November 1981, Plaintiff received notice from Mack that his

recall rights pursuant to the seniority system had expired. (Para. 17, Morales Affidavit).

On or about January 1984, Plaintiff learned that Mack had agreed with the Union to recall employees laid off over two years who lost their seniority based upon a former seniority list. (Para. 18, Morales Affidavit). Despite this agreement and despite the fact that he should have been recalled under this agreement, Plaintiff learned that he was not going to be recalled. (Para. 19, Morales Affidavit). Plaintiff knew that laid-off employees who were white and had less seniority than he did were recalled under the agreement, and that he was intentionally by-passed. (Para. 20, Morales Affidavit).

Through his attorney, Richard J. Orloski, and the Spanish-American Association, Plaintiff informed Mack of its error in passing over him in its recall. (Para. 21, Morales Affidavit). Mack Trucks specifically advised Lupe Pierce of the Spanish-American Association

that Plaintiff was being passed over because of his absentee record, and she immediately advised them that this was in error because he had a good attendance record. (Para. 22, Morales Affidavit).

The reason Mack gave for failing to recall Plaintiff was that he had an excessive amount of absences when, in actual fact, he had an excellent attendance record. (Para. 23, Morales Affidavit). Plaintiff personally requested Mack to review its decision not to recall him because he knew that he had only one absence and one lateness. At that time, he reminded Mack that he had been injured in January 1979, and that he was not released from workmen's compensation until April 14, 1979. Other than the excused absences that occurred within the period immediately surrounding his injury, no dispute exists that his attendance record was well within the standard established by mack which required his recall. (Para. 24, Morales Affidavit).

The sole reason Mack failed to recall Plaintiff was because of race and/or national origin. (Para. 25, Morales Affidavit). In the deposition of George Windish, he specifically indicated that, if Plaintiff had less than 10 tardiness/absences, he should have been recalled, and in actual fact, Plaintiff had less than 10 tardiness/absences. (Para. 26, Morales Affidavit).

George Windish, a management person from Mack Trucks specifically indicated in his deposition that the union at Mack Trucks had requested that employees with expired recall rights be given first priority, and that he made the decision to follow this procedure. (Deposition of Windish,N.T. 8). He further indicated that the review procedure was that anyone with expired recall rights would not be rehired IF they had more than 10 incidences of absenteeism within a year or other disciplinary infractions. (Deposition of Windish, N.T. 11,12,14). To put it in the affirmative, IF an employee had expired recall

rights, no record of disciplinary infractions, and less than 10 incidents of absenteeism in the last year, he was supposed to be rehired by Mack Trucks according to the company's policy as enunciated by Windish. (Windish Deposition, N.T. 19,20).

Inasmuch as Plaintiff was in the pool of employees with expired recall rights, inasmuch as he had no disciplinary infractions whatsoever, and inasmuch as he had only two absences and two tardiness in his entire 18 month history of employment with Mack Trucks, he met the standard announced by Mack for hiring, and he should have been rehired.

In the specific instance of a white male (Kent G. Kemmerer/Badge No. 5966), non-Hispanic who requested Mack Trucks review its decision not to recall an employee because of an alleged poor absentee/tardiness record, Mack Trucks reviewed its decision not to recall said employee, and after reviewing the record, reversed itself. (Para. 27, Morales Affidavit). In Plaintiff's

specific instance, Mack Trucks failed to make a real review of his record and solely because of his race and/or national origin, refused to recall him. (Para. 28, Morales Affidavit). In actual fact, Plaintiff's record was better than Kent G. Kemmerer, but Mack recalled him because he was white, and refused to recall Plaintiff because he was Hispanic. (Para. 29, Morales Affidavit).

Not only did Mack Trucks not fully review Plaintiff's record after his request as was done for white employees, Mack Trucks knew that it could not rely upon the time sheet print-outs for the Macungie Plant because the print-outs were inaccurate, and Mack Trucks knew that they were inaccurate. (Para. 30 Morales Affidavit and Deposition of Anna M. Cervasi).

In addition to the computer print-outs being inaccurate, Mack Trucks knew that, in the instance of an employee who was injured on the job and was being carried on "dispensary time" or "workmen's compensation

time", the computer print-outs required dispensary personnel or supervisory personnel to properly record such times into the computer, and Mack Trucks knew that, in his specific case, the dispensary personnel and supervisor personnel were punching in erroneous and often contradictory information concerning his attendance. (Para. 31 Morales Affidavit and Deposition of Anna M. Cervasi).

In addition to knowing that its computer print-outs were fatally flawed, Mack Trucks knew that--if Plaintiff's attendance/tardiness record was as it claimed--that Plaintiff would have been subject to discipline by his supervisors, and the absence of any such discipline is an affirmative admission by Mack Trucks that his attendance record was not as it claimed. (Para. 32, Morales Affidavit and Deposition of George E. Windish, N.T. 34).

Despite this record, the trial court found as a matter of law that Mack's treat-

ment of Plaintiff was "even-handed" In reaching this result, the trial court complained that Plaintiff should have done what those white employees who were initially rejected did, namely, seek further review of the decision directly with Mack instead of filing a complaint with the EEOC. (See, page 8 of District Court's Opinion dated april 8, 1986).

In making this observation, the trial court overlooked a crucial verified fact in Plaintiff's Affidavit: he went to the Spanish-American Association and had them intervene on his behalf, and Lupe Pierce was specifically told that he was not going to be recalled because of his absentee record. He thereafter obtained legal counsel who attempted to resolve the matter with Mack Trucks but Mack insisted that it was not going to recall Plaintiff no matter what Morales or his counsel said because

it was sticking to its story that he had an excessive absentee record. (Para. 21-25 Morales Affidavit).

It was only after the unsuccessful efforts of Morales himself, Lupe Pierce of the Spanish-American Association, and independent legal counsel that Morales filed the Complaint with the EEOC because Mack was willing to review the records of three white employees, and reverse itself, but was never willing to review its flawed decision on the Morales re-hire.

Hence, the EEOC charge was the next logical--and inevitable--step. Based upon these facts, the trial court erred in judgment in favor of Defendant and against the Plaintiff. The Court of Appeals erred in affirming that judgment. The Petition For Writ of Certiorari follows.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal court of Appeals has rendered a decision sanctioning a lower court order which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE THE COURT FOUND THAT PLAINTIFF FAILED TO MEET HIS BURDEN OF SHOWING THAT DEFENDANT'S FAILURE TO RECALL HIM WAS PRETEXTUAL DESPITE PLAINTIFF'S ALLEGATION OF FACTS WHICH CREATE GENUINE ISSUES OF MATERIAL FACT CONCERNING DEFENDANT'S TRUE MOTIVES FOR BYPASSING PLAINTIFF?

1. Disputed facts preclude summary judgment. Federal Rule of Civil Procedure 56(c) states that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Small v. Seldows Stationary 617 F.2d 992 (3d Cir, 1980). The

court does not decide issues of fact, but simply determines if there is an issue of fact to be tried. Ettinger v. Johnson 556 F.2d 692 (3d Cir, 1977). The facts must be viewed in the light most favorable to the opposing party, and any reasonable doubt as to the existence of genuine issues of fact is to be resolved against the moving parties. Continental Insurance Co. v. Bodre 682 F.2d 436 (3d Cir, 1982).

The Court of Appeals judgment order affirming the trial court's granting summary judgment for Defendant has so far departed from the accepted and usual case law in this area as to call for an exercise of this Court's power of supervision. Rule 17(1)(a) of the Rules of the United States Supreme Court.

Applying the summary judgment standard to the case at bar, the Plaintiff proved the following facts:

1. Plaintiff is a foreign national who is Hispanic;

2. Plaintiff lost his recall rights under the collective bargaining agreement;

3. After Plaintiff lost his recall rights, Mack announced a policy that former employees with recall rights would be re-hired on the basis of lost seniority PROVIDED that they had no disciplinary infractions, and PROVIDED further that they had less than 10 incidents of absenteeism in the last year that they worked for Mack;

4. Absences and tardiness caused by a work-related injury were not to be counted against Morales (Windish deposition, N.T., 19,20).

5. When the period of embracing his work-related injury was excluded, Plaintiff had only 4 absences/tardiness in an 18 month period;

6. Plaintiff had no disciplinary infractions against him, for excessive absenteeism or otherwise;

7. IF Plaintiff had an absentee record as alleged by Defendant, he would have been disciplined. (Windish Deposition, N.T, 34);

8. Plaintiff was aware of one white male (Kent G. Kemmerer, Badge No. 5966), a white non-Hispanic, who had not been recalled because of excessive absenteeism and after a re-review of his record, he was called back;

9. Mack Trucks admitted that it reversed itself for three white male employees with initial absentee problems, but it refused to do so for Celso Morales;

10. Plaintiff made three separate efforts to have Mack Trucks review its record in order to reverse itself: 1) a personal contact by Celso Morales; 2) an intervention by Lupe Pierce of Spanish-American Association; and 3) intervention of legal counsel. All three efforts failed, and Mack insisted that it would not rehire Morales because of an absentee problem.

11. Mack knew that its computerized attendance records were in error because dispensary personnel and supervisory personnel were often punching in erroneous, and often contradictory information concerning attendance by employees with a work-related injury and assigned to "dispensary time" or "workmen's compensation."

12. Despite knowledge that its records were flawed, Mack Trucks relied upon these flawed documents in the instance of Celso Morales, but did not rely upon them in the instance of three white employees, including Kent G. Kemmerer, and instead individually reviewed the attendance records of the white employees, and allowed them to be rehired.

These are the facts within which Defendant's

Motion For Summary Judgment ought to have been decided.

2. The trial court found that Plaintiff proved a prima facie case. After considering the 4 element McDonnell Douglas test (set forth in McDonnell Douglas Corp. v. Green 411 U.S. 792, 802 (1973), the trial court found that Plaintiff's Affidavit, exhibits and depositions create an issue of fact as to the accuracy of the computerized time records. Hence, the trial court concluded that :...Plaintiff has stated a prima facie case of discrimination under Title VII..." District Court Opinion, April 8, 1986, page 7.

3. Shift of burden of production to Defendant. If the court concludes that Plaintiff has proved a prima facie case by preponderance of the evidence, then the court must consider defendant's explanation of or justification for the presumptively discriminatory action or practice. The claim asserted by the plaintiff determines the defense upon which the defendant must reply.

(a) In a disparate treatment case, the Defendant must introduce some admissible evidence showing a legitimate non-discriminatory reason for its action. Texas Department of Community Affairs v. Burdine 450 U.S. 248, 254-55 (1981); Board of Trustees v. Sweeney 439 U.S. 24 (1978) (per curiam); Furnco Construction Corp. v. Waters 438 U.S. 567 (1978). Then, the presumption of discrimination drops from the case and the district court is in a position to decide the ultimate question in such a suit--whether the particular employment decision at issue was made on the basis of race. U.S. Postal Service Board of Governors v. Aikens 460 U.S. 711 (1983). Needless to say, this decision cannot be made on summary judgment, but only after trial.

(b) In a disparate impact case, the defendant must produce evidence charging that the challenged test or requirement bears "a manifest relation tothe employment in question." Dothard v. Rawlinson 433 U.S. 321, 329 (1977) (quoting Griggs v. Duke Power Co. 401 U.S. 424, 432 (1971).

The prevailing view appears to be that this "business necessity" defense should generally be narrowly construed and confined to those unusual instances where a segregative policy is absolutely essential to the achievement of a legitimate business need. Nashville Gas Co. v. Satty 434 U.S. 136 (1977).

(c) In all instances, the burden of production is on the defendant to establish such a defense. Texas Department of Community Affairs v. Burdine 450 U.S. 248, 256-58 (1981).

4. Reshift of burden of persuasion to plaintiff. If a defendant has produced evidence to raise a genuine issue of fact as to whether it was motivated by a "legitimate nondiscriminatory reason" or a "business necessity", plaintiff may still prevail if he can prove by a preponderance of the evidence that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is pretextual. Texas Department of Community Affairs v. Burdine

450 U.S. 248, 256 (1981); McDonnell Douglas Corp. v. Green 411 U.S. 792, 805-806 (1973).

5. Plaintiff met the standard of rebutting properly articulated, nondiscriminatory reasons for its actions.

(a) The trial court concedes that the attendance records were riddled with inaccuracies, and that "...Mack's conclusion as to Morales' bad attendance record may have been erroneous." Opinion, page 6. The Trial Court further concedes that "...Mack may have been mistaken in its conclusion that his attendance record was poor." District Court Opinion, 4/8/86, pg. 7. The very fact of an "erroneous decision" lends credence to Plaintiff's position that the refusal to re-hire him was pretextual and that it was really motivated by "impermissible considerations." Furnco construction Corp. v. Waters, supra.

(b) The trial court found as a fact that Mack was entitled to rely upon its own records provided that all classes of potential employees received equal treatment. Opinion,

4/8/86, pg. 9-10. This adverse finding of fact is contradicted by the record. Mack's treatment of Plaintiff was not evenhanded. Three white employees, including Kent G. Kemmerer, were initially passed over for rehire based upon a review of the faulty records. Thereafter, each white employee received an individual review, and Mack reversed itself, and rehired the three white employees with flawed absentee records. In the case of Morales, such a review was sought, and proved futile.

(c) In its footnote at page 8 of the Opinion, the trial court belittled the efforts made by Morales in attempting to get Mack Trucks to review his "real" absentee record, and implicitly chastizes him for timely filing a charge with the EEOC. The record is clear that Morales made a deliberate, concerted effort to get someone at Mack Trucks to look at his "real" absentee record. He personally requested Mack to review its decision, he reminded Mack that he had been injured in January 1979, and that he was not released

from workmen's compensation until April 14, 1979. (Para. 24, Morales Affidavit). When that failed, Plaintiff sought assistance from Lupe Pierce of the Spanish-american Association, and she obtained the same response: poor absentee record. (Para. 22, Morales Affidavit). When that failed, Plaintiff sought formal legal assistance, and legal counsel informed Mack of its error. (Para. 21, Morales Affidavit).

The trial court claims as follows:

> "It is impossible to determine whether the decision would have been reversed in his case as it was for the three [white] employees who apparently did follow that course."

District Court Opinion, page 8.

That factual finding is contrary to the record, especially when viewed in light most favorable to the non-moving party. Plaintiff followed that course--through three separate avenues, (himself, Lupe Pierce and legal counsel), and was rebuffed three times.

Mack had no "benign" reason for treating Plaintiff's case differently. Preferential treatment was given to 3 white

employees, with erroneous absentee records, and not given to Plaintiff. Hence, summary judgment and affirmance thereof by the Court of Appeals was inappropriate.

II. WHETHER OR NOT THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF"S CLAIM FOR BREACH OF CONTRACT WHERE PLAINTIFF ALLEGED FACTS CREATING A GENUINE ISSUE OF MATERIAL FACT?

The issue of whether or not the actions of parties constitutes a contract is ordinarily a question of fact which precludes summary judgment. Insurance Co. of State of Pa. v. J.L. Kelly, Inc. 612 F.Supp. 1196 (D.C., N.Y. 1985).

In the case at bar, Plaintiff alleged that there was a contractual arrangement between Mack Trucks and the union where the parties agreed that former employees with expired recall rights would be given preferential hiring PROVIDED the former employees had no absentee problem and no disciplinary problems. The Defendant confirms the existence of an arrangement wherein employees with expired recall rights would be rehired,

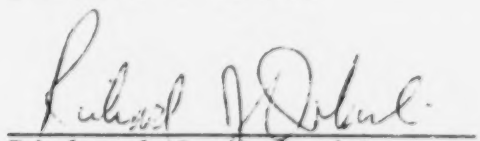
but contends that it was a company policy independent of any contractual obligation with the union. (Windish Deposition, N.T. 7-9).

Whether it is called a "contract" between the company and the union, or a policy wherein the company obligated itself to its former employees to give them preferential hiring rights, the undisputed existence of either a contractual obligation, or policy commitment raised a reasonable expectation of hiring in Plaintiff, Plaintiff relied upon the representations to his detriment, and Plaintiff has legal redress under the company stated policy. Hence, summary judgment on Plaintiff's breach of contract claim, or breach of company policy claim was unfounded.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming the trial court's granting summary judgment in favor of Defendant, and against the Plaintiff ought to be reversed.

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS FOR THHE THIRD CIRCUIT

NO. 86-1295

MORALES, CELSO

v.

MACK TRUCKS, INC.,

Celso N. Morales,

Appellant

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Docket No. Civil 84-4454
District Judge: Honorable E. Mac Troutman

Submitted Under Third Circuit Rule 12(6)
November 18, 1986

Before SEITZ, GIBBONS and HUNTER,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/S/ James Hunter

JAMES HUNTER, III, Circuit Judge

Attest:

/S/ Betty J. Robinson

Deputy Clerk

Dated: November 26, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CELSO N. MORALES	:	FILED APR 15, 1986
	:	
vs.	:	
	:	CIVIL ACTION NO.
MACK TRUCKS, INC.	:	No. 84-4454

MEMORANDUM AND ORDER

TROUTMAN, S.J. April 5, 1986

Plaintiff Celso N. Morales contends that defendant Mack Trucks, Inc's refusal to offer him employment in January, 1984, was a violation of Title VII of the Civil Rights Act of 1964. (42 U.S.C. §2000(e), et seq.; specifically, §§2000(e)-2(a) and §§2000(e)-5(f).) Morales also contends that Mack's actions constituted a breach of contract. Mack denies that any contractual rights are implicated and contends that its refusal to hire Morales was based upon a legitimate, job-related criterion, not his race or national origin. Accordingly, Mack has now moved for summary judgment.

Morales worked for Mack Trucks, Inc. from May, 1978, until November, 1979, when he and a substantial number of other employees

were laid off for lack of work. As a member of the United Auto Workers of America (UAW), Morales and the others retained recall rights pursuant to the terms of the Master Shop Agreement between Mack and the Union. When two years had passed without a recall, Morales was notified by Mack that his Union seniority rights had expired, pursuant to the Agreement between Mack and the Union.

Thereafter, early in 1984, Mack experienced a significant increase in its business. After recalling laid off employees who still retained seniority rights, Mack had many remaining positions to fill by hiring new employees. Rather than resort to a general pool of untried workers, Mack's management decided to offer new employment to former employees, such as Morales, who no longer possessed a contractual right to recall. Mack compiled a list of such employees, slightly more than two hundred in number. However, Mack also prescreened the list to eliminate "problem" employees, defined as those

with disciplinary infractions and/or poor attendance records. Mack selected ten absences or tardinesses as the cut-off for the latter criterion and declined to offer reemployment to any former employees whose records revealed ten or more attendance infractions in the calendar year prior to termination of employment.

In January, 1984, Morales learned that Mack was contacting former employees to offer them new positions with the company. Upon inquiry, he was told that he, too, would be contacted. However, when he realized that Mack had passed his former employee identification number in its progress through the list of former employees, he took further steps to determine why he had not been offered a job.

At Morales' request, Lupe Pierce, of the Spanish-American Association, contacted Mack on his behalf. She learned that Mack's records indicated that Morales had an excessive number of absences and/or tardinesses

for the year preceding his lay-off. Pierce requested a more thorough review of Morales's records. Thereafter, a Labor Relations Representative at Mack's Macungie plant, where Morales had worked for most of the period in question, reviewed his clock-in record. In doing so, the reviewer, Thomas Thomasik, eliminated absences due to a work-related injury which Morales suffered in January, 1979, and for which he received Workmen's Compensation benefits. However Thomasik concluded that Morales's absences exceeded the number Mack found acceptable. Accordingly, Morales was informed, through Pierce, that he was not offered employment because of a poor prior work record at Mack.

Morales disputed Mack's conclusion as to his work record, but pursued it no further with the company at that time. Instead, he filed a complaint with the Equal Employment Opportunity Commission (EEOC). This case was timely filed after the EEOC

issued a right to sue letter.

In addition to the pending motion for summary judgment, there are two other outstanding motions: Mack's motion for a non-jury trial and its motion to strike hearsay from the affidavit of Celso Morales, filed in support of Morales's brief in opposition to Mack's summary judgment motion. These motions have become moot in light of our decision on the motion for summary judgment.

The disposition of this case centers on Morales's record of absence and tardiness during his final year of employment at Mack. He contends that the accuracy thereof, at the least, raises an issue of material fact as to Mack's reason for not rehiring him. Mack contends that its record is accurate and, in any event, that it was entitled to rely on it in the absence of any other objective indicia of Morales's desirability as an employee, especially since all former employees considered for rehire were screened in the same way. In fact, Mack contends, the excessive number of

attendance infractions attributed to Morales destroys his prima facie case of discrimination in that it rendered him unqualified for the position he sought.

The elements of a prima facie case under Title VII are both well established and well known: the plaintiff must show that he belongs to a protected class; that he was qualified for the position for which the defendant was hiring; that he was rejected; and that the position remained open and the defendant continued to seek applicants with the plaintiff's qualifications. McDonnell Douglas Corp. v. Green 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Mack's position that Morales's attendance record rendered him unqualified, takes too narrow a view of the term "qualified". There is no suggestion in the record that Morales could not satisfactorily perform the duties of the position he sought, only that Mack considered him an undesirable prospect because of its prior experience with him. Morales was not

"qualified" only in the sense that, although he belonged to a particular class of prospective employees singled out for treatment potentially more favorable than that accorded new applicants, he failed to fulfill the only requirement for receiving the favored treatment accorded former Mack employees, viz, a satisfactory attendance and disciplinary record with the company. As a consequence, Mack refused to consider him for employment at all, since new applications from former employees were rejected. Applicants with no prior employment history at Mack were presumably subject to evaluation on more bases than their attendance and disciplinary records in former employment. Mack does not contend that such records were ever considered with respect to applicants previously unknown to it. Thus, to transform rehiring criteria, which applied only to a certain class of ptential employees, into a job qualification would place Morales at a double disadvantage; not

only did his prior employment at Mack foreclose future opportunities there, but it would effectively vitiate his right to seek review of Mack's treatment of him, which he contends was racially motivated. Moreover, the question of whether Mack's records with respect to Morales are accurate is an issue in dispute. A decision that plaintiff failed to establish a prima facie case by agreeing that he failed to show that he was qualified would resolve a disputed issue of fact in favor of the moving party, an improper procedure in considering a motion for summary judgment.

Finally, it appears from the record that Mack's conclusion as to Morales bad attendance record may have been erroneous. Mack's internal review performed by Thomasik reduced Morales's purported attendance infractions to twenty-one. See, Exhibit C to Thomasik Affidavit. Our review of the remaining infractions suggests that three appear to be correct. Plaintiff does not

offer an explanation as to why Mack's records indicate that he clocked-in late on January 3 and 8, 1979, and does not dispute that he was absent due to weather conditions on February 19, 1979. All of the remaining eighteen infractions occurred between January 12 and april 27, 1979, a period of time during which Morales was recovering from a back injury, sustained while working, on January 8, 1979.[1] Morales testified at his deposition that when working day shift during that period of time, he was required to report to the dispensary before clocking-in. Giving him the benefit of every doubt, it appears that six to eight other absences or instances of tardiness can

[1] Morales testified at his deposition that the injury occurred about mid-shift. (Morales Deposition at 78). Consequently, it would not account for tardiness at the beginning of the shift.

be accounted for by that practice or because Morales was kept in the dispensary or sent home after reporting to the dispensary. That still leaves a minimum of ten infractions, which would render him unacceptable for rehire. However, Morales also testified that he was to report to the "light duty" desk before clock-in when he worked third shift. (Morales Deposition at 90). All of the third shift dates which Mack considered infractions are instances of tardiness ranging from two to eight minutes after the scheduled starting time. Even if only one of those can be attributed to Morales's inability to complete his injury-related procedures before beginning work, he would have been below Mack's threshhold of unacceptability.

True, Morales may have been wrong about the procedures he was to follow with respect to clocking-in, but the record is obscure enough on that issue to raise an issue of fact as to whether he was, in fact, unqualified according to Mack's rehiring

criteria if his tardiness was related to his injury.

Having determined that plaintiff has stated a prima facie case of discrimination under Title VII, we next consider whether the defendant has articulated a legitimate, non-discriminatory reason for rejecting Morales. McDonnell Douglas Corp. v. Green, supra. On this issue, the question of whether Mack's records of Morales's attendance were, in fact, accurate assumes a different character. It is undisputed that Mack screened all former employees in the same way. Mack provided a detailed description of the procedures it used to determine which former employees were acceptable for rehire. (See, Deposition of George Windish at 8-19). There is no suggestion that the criteria varied. Morales asserted only his belief that some former employees were treated more favorably. Mack admits that three white employees who were initially rejected provided excuses for some of their absences, thereby reducing them to an

acceptable number, and were subsequently rehired. Morales has not provided any evidence that would discredit Mack's explanation. Moreover, Mack acceded to the request of Lupe Pierece and conducted an individual review of Morales's records which reduced the number of his absences, although not below the number needed for rehire under Mack's policy. Thus, since Mack was willing to reconsider its initial decision as to Morales, at the request of his representative, presumably it would do the same for other former employees.[2]

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[2]After the initial review of plaintiff's records by Thomasik, Morales did not, apparently, seek any further review from Mack or offer his explanation of why he maintained that the record was erroneous. Instead, he filed the EEOC complaint. Morales now asserts that Mack failed to conduct a real review, but offers no supporting evidence. It is impossible at this juncture to know whether Mack would have accepted his explanation and conducted a further review if given the opportunity to do so. It is also impossible to determine whether the decision would have been reversed in his case as it was for the three employees who apparently did follow that course.

Next we consider the final aspect of the analysis of a Title VII claim, whether the plaintiff has borne his burden of demonstrating that the reason given by the defendant for not hiring the plaintiff is pretextual. McDonnell Douglas Corp. v. Green, supra. Again, the central issue is the significance of Morales's attendance record. Does the question of its accuracy raise an issue of material fact so as to preclude summary judgment for Mack?[3]

In a disparate treatment case under Title VII,[4] a plaintiff is required to rebut

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[3]Morales purports to raise several issues of material fact by way of an affidavit. However, as Mack points out, much of the affidavit consists of hearsay only or of asserted "facts" of which Morales has no personal knowledge, e.g., that his attendance record was better than that of another employee and that Mack had an agreement with the Union to rehire former employees. Consequently, the affidavit is not sufficient to raise material issues of fact that preclude summary judgment.

[4]Plaintiff has not alleged or argued that Mack's policy with respect to attendance had a disparate impact upon the minority members of the pool of potential employees from which Mack was hiring. Therefore, we do not address that theory of liability.

defendant's properly articulated, non-discriminatory reason for its action. Bellissimo v. Westinghouse Electric Corp. 764 F.2d 175 (3d Cir, 1985). Morales has failed to do so in this case. The most he can show is that Mack may have been mistaken in its conclusion that his attendance record was poor. However, in this instance, Mack was entitled to rely upon its own records provided that all classes of potential employees were subject to evaluation on the same basis. As the Third Circuit Court of Appeals has noted:

> "The [Civil Rights Act of 1964] prohibits only 'discrimination'. Therefore, consideration of the practices of the [employer] toward the plaintiff must be evaluated in light of its practices toward the allegedly more favored group... Kunda v. Muhlenberg College 621 F. 2d 532 (3d Cir. 1980)."

Here, the plaintiff has addressed only Mack's treatment toward himself. While that is sufficient to establish a prima facie case, it is not sufficient to carry the ultimate burden of proof. In the face of Mack's record evidence of even-handed treatment, Morales can

only assert that he has "heard" otherwise. The only issue of fact that he has raised is whether Mack was mistaken in its decision not to rehire him.

Morales asserts that he was intentionally bypassed because of his race and national origin. However, he has not shown that he was refused rehire because Mack intentionally discriminated against him on the basis of race. Other Hispanics with satisfactory attendance record were offered reemployment with Mack. Morales has not suggested that he could show that Mack made similar mistakes in the records of those Hispanics not offered reemployment as was arguably made in his case. Likewise, he has not suggested that similarly situated non-Hispanics former employees, i.e. those who sustained an injury within the final twelve months of their employment with Mack, were treated more favorably with respect to their attendance records.

Finally, Mack has provided uncontro-

evidence that it had a policy of encouraging minority recruitment at the time Morales was rejected. Ray Spencer of the Private Industry Council, a private, non-profit corporation engaged in training and placing workers, testified at his deposition that Mack specifically instructed him to target minorities for recruitment. (Spencer Deposition at 22). Given Mack's prior decision to offer new employment to its former employees because of their experience with the company, (Windish Deposition at 9), its policy of minority recruitment and the absence of any other evidence of discrimination, a jury could not infer that Mack's refusal to hire Morales is attributable to racial or ethnic prejudice.

Since Title VII is a remedy for discrimination, not error, Mack is entitled to summary judgment on Morales's Title VII claim.

Count II of the complaint alleges breach of contract. However, Morales' own

deposition testimony, as well as that of a company representative, establishes that Mack unilaterally decided to offer new employment to former employees whose seniority rights had expired, that the Union had not bargained for that policy and that it was not a matter of contract between Mack and UAW. (Morales Deposition at 52, Windish Deposition at 7). The only purported "evidence" of a contract to rehire former employees is plaintiff's affidavit in which he asserts that someone told him there was an agreement between Mack and the Union and on that basis he believes that a contract existed. In light of his contradictory deposition testimony, that affidavit falls far short of raising a material issue of fact with respect to the existence of a contract. Thus, it is clear that Mack is entitled to summary judgment on Count II of the complaint as well.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CELSO N. MORALES	:	
	:	CIVIL ACTION NO.
vs.	:	84-4454
	:	
MACK TRUCKS, INC.,	:	

O R D E R

TROUTMAN, S.J.

AND NOW, this 8th day of April, 1986, upon consideration of defendant's motion for summary judgment, plaintiff's response thereto and the entire record, IT IS ORDERED that the motion is GRANTED and judgment is entered in favor of the defendant and against the plaintiff.

/S/ E. Mac Troutman
S.J.